



Fact Sheet

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY • ENVIRONMENTAL ASSISTANCE DIVISION • 1-800-662-9278

Environmental Audit Privilege & Immunity

It is important to the success of Michigan's environmental protection efforts that businesses, municipalities, and public agencies take self-initiated actions to assess or audit their compliance with environmental laws and correct any violations found. For example, it is estimated that thousands of small businesses in Michigan have never applied for or obtained necessary environmental permits, fearing the disclosure of information to state agencies would lead to enforcement and penalties.

The Environmental Audit Privilege and Immunity Law removes this fear and provides incentives for businesses to perform environmental audits and promptly report and correct violations. This will lead to increased compliance with environmental requirements and further protection of Michigan's outstanding natural resources. ?

PART 148 OF THE ENVIRONMENTAL CODE

On March 18, 1996 Governor Engler signed into law Part 148 of Michigan's Environmental Code, the Environmental Audit Privilege and Immunity Law (Part 148).

The purpose of Part 148 is to encourage businesses, municipalities and other entities to conduct environmental self-audits and to promptly disclose and correct any violations found.

DEFINITIONS

Environmental Self-Audit - An environmental self-audit is a voluntary, internal evaluation of a facility (or activity) regulated by environmental laws, conducted after March 18, 1996, that is designed to:

- identify past or current noncompliance
- prevent noncompliance or improve compliance;
- identify an existing or potential hazard, contamination, or adverse environmental condition, or
- improve an environmental management system or process.

Environmental Audit Report - The environmental audit report is the document or set of documents created as a result of the environmental self-audit. Documents included in the audit report (except those that are not privileged) must be labeled "Environmental Audit Report: Privileged Document". The audit report shall include supporting information, which may include a full range of information (notes, records, charts, etc.) provided such information or documents are created or prepared as a result of an environmental audit.

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Environmental Assistance Division

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Environmental Assistance Center

1-800-662-9278

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The audit report may also include an implementation plan that describes past noncompliance, improves existing compliance or management systems, and prevents future noncompliance.

ENVIRONMENTAL AUDIT PRIVILEGE AND SELF DISCLOSURE IMMUNITY

Part 148 contains two major provisions:

- 1) Establishes limited privilege status for an internal environmental self-audit. This means that certain information contained in the environmental self-audit report can be held confidential (privileged) and is not accessible to a state or local government agency or the public.
- 2) Provides immunity from state and local administrative, civil and criminal fines and penalties (except in the case of gross negligence) for violations that are discovered through an environmental self-audit and are voluntarily and promptly reported to the appropriate state and/or local regulatory agency and corrected. Any disclosures sent to a local regulatory agency should also be sent to the DEQ district office.

Environmental Audit Privilege

The owner, operator or his/her representative can conduct a voluntary environmental self-audit and develop an environmental self-audit report at any time. Certain information provided in an environmental audit report is considered privileged and is therefore protected from disclosure.

The following information cannot be considered privileged (even though it may appear in an environmental self-audit report):

- *Documents, communication, data, reports, or other information required to be made available or reported to a regulatory agency or any other person by statute, rule, ordinance, permit, order,*

consent agreement, or as otherwise provided by law.

For example, if a company has a water discharge permit that requires reporting the discharge quality to the Department of Environmental Quality (DEQ), those reports are not privileged and cannot be held confidential under this statute. Likewise, if a company has a gasoline spill on site, existing regulations require the spill to be reported to the DEQ, and that information cannot be considered privileged.

- *Information obtained by observation, sampling, or monitoring by any regulatory agency.*

- *Pretreatment monitoring results that a publicly owned treatment works or control authority requires to be reported for facilities that discharge wastewater to a municipal sewer system.*

- *Information from a person or source not associated with the environmental audit. For example, if an employee not engaged in the environmental audit activity advises the regulatory agency of a violation, that information is not considered privileged.*

- *Machinery and equipment maintenance records.*

These exemptions to confidentiality (the self-audit privilege) do not limit already existing protections granted under other common law privileges, such as the attorney-client privilege.

Under Part 148, a person (individual, business, municipality or other entity) that conducts an environmental self-audit and a person to whom the self-audit results are disclosed do not have to testify about any privileged information in the self-audit report. In addition, the privileged information contained in the report is not subject to discovery or admissible as evidence in legal proceedings. Information from a self-audit cannot be privileged unless it is contained in an environmental self-audit report.

The privilege is not waived if the confidential information is disclosed to a governmental official under the terms of a confidentiality agreement.

Part 148 establishes a procedure by which the state or local law enforcement agency can seek disclosure of privileged material. The agency must prove to a Circuit Court Judge that the privilege was asserted for a fraudulent purpose, the material was not subject to the privilege or even if subject to the privilege, the facility failed to take corrective action or eliminate a violation found by the environmental self-audit within a reasonable period of time.

State and local agencies retain their authority to review information required to be made available or reported to the agency under current permits, environmental laws and regulations, or other legal documents or agreements.

Self Disclosure Immunity

Under Part 148, a person (individual, business, municipality, or other entity) is immune from any administrative or civil fines and penalties and from criminal fines and penalties for negligent acts or omissions (other than acts of gross negligence) related to violation(s) of Michigan's Environmental Code, provided that person makes a **voluntary disclosure** of the violation(s) to the appropriate state or local agency.

The voluntary disclosure immunity in Part 148 applies only to violation(s) of the following articles of Michigan's Environmental Code, and any rules promulgated thereunder:

Article II. Pollution Control (All Chapters)

Article III. Natural Resources Management

Chapter 1: *Habitat Protection*

Chapter 3: *Management of Nonrenewable Resources*

These are the state's environmental protection laws administered by the DEQ.

To be considered voluntary, the disclosure must meet all of the following criteria:

- *The disclosure of the information arises out of an environmental self-audit;*
- *The self-audit occurs before the person is made aware that he or she is under investigation by a regulatory agency;*
- *The disclosure is made promptly after knowledge of the environmental violation is obtained by the person;*
- *The person initiates an appropriate and good-faith effort to achieve compliance, pursues compliance with due diligence, and promptly corrects the violation after its discovery.*

There is a "rebuttable presumption" that a disclosure made under Part 148 is "voluntary." This means that it is assumed to be true but the state or local agency may rebut, or challenge that presumption. The agency bears the burden of proof in rebutting or challenging the presumption that the disclosure was voluntary.

People who have a history of violating the law cannot use the immunity provision in Part 148. The penalty immunity does not apply to a person who has been found guilty of knowingly committing a criminal act, or has committed a series of violations that constitute a pattern of violations of environmental regulations within the three year period prior to the date of the disclosure.

The immunity does not eliminate or affect a person's legal responsibilities to correct the violation, conduct necessary remediation, or pay damages.

This means, for example, that if a company determines through an environmental self-audit that they had a spill of gasoline on the ground,

the company must take responsibility in addressing the situation in accordance with Michigan's Environmental Code. This could include investigations, remedial plans and remediation activities.

Part 148 does not provide any immunity from federal laws or regulations. The federal policy on self-audits and voluntary disclosure is contained in the January 22, 1996 EPA policy: "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations". Questions regarding the federal policy should be directed to Ms. Tinka Hyde, Region 5 Enforcement Coordinator at (312) 886-9296.

SUMMARY

An environmental audit is a voluntary and internal evaluation conducted after March 18, 1996 (the effective date of Part 148). This law is designed to promote the use of self-audits to identify historical or current noncompliance and prevent noncompliance, or improve compliance with environmental rules and statutes. An environmental self-audit can also be used to identify an environmental hazard, site contamination or other adverse environmental condition.

The self-audit, which is conducted by the company or its representative, systematically reviews processes and searches for problems that need attention; e.g., water discharges or air emissions that require permits, or site contamination that requires cleanup. The environmental self-audit can cover all or part of a company's activities.

The environmental self-audit does not require written documentation or a report. It can be as simple as an evaluation by the company or its contractor to determine the need for additional

action. However, only the information included in an environmental self-audit report qualifies for being considered privileged, and only those violations discovered through the self-audit can qualify for immunity.

If an environmental self-audit report is developed and the facility wishes to keep the self-audit information privileged, documents must be labeled: "ENVIRONMENTAL AUDIT REPORT: PRIVILEGED DOCUMENT".

The environmental self-audit report is an internal company document. It is not required to be sent to the regulatory agency. Information required to be reported under any environmental regulation or existing permit, however, must be reported to the agency. Remember, if such information were included in a self-audit report, that information would not be considered privileged.

If you have additional questions, call the DEQ Environmental Assistance Center toll-free:

1-800-662-9278

or write to:

Environmental Assistance Division
Michigan Department of Environmental Quality
PO Box 30457
Lansing, MI 48909

Internet:

Access the DEQ Home Page for additional information at:

<http://www.deq.state.mi.us>

NOTE: This fact sheet is for informational purposes only, and is not an official legal opinion of the State of Michigan. Any questions relating to the application of this law to any specific business, municipality or other entity should be addressed to appropriate legal counsel.